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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY
GRAMMER, FRANCIS X. HOPKINS, MARIO PEART,
JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS
ADAMS, ROBERT BENSON, TERRY KIENE,
RUSSELL SCHUSTER, MICHAEL R. FORD, KARL
EISBACK, NEBRASKA STATE PENITENTIARY
HOUSING UNIT #4 CORRECTIONAL OFFICERS/
CORPORALS, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I

EX POST FACTO CLAUSE

That prior to the enactment of §83-4,114 and NDCS Rule 6(16)
the only preexisting authority to allow solitary confinement, for
purposes of institutional control, was §83-185 (Cum. Supp. 1972)

7/19/90

which was addressed by the Court in Wolff v McDonnell, 418 U.S. 539 (1974). The text of §83-185 is detailed in Wolff, at 545 n. 5. The Court in Wolff, at 571 n. 19, specifically found that solitary confinement is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Petitioner cited Wolff, supra, which addressed §83-185, in paragraphs 44 and 45 of his Complaint which respondents have placed in the Appendix of their Brief. Thus, the solitary confinement aspect of Wolff is incorporated in §§83-4,111 and 83-4,114. However, §83-4,114 allowance of solitary confinement, for purposes of institutional control, was not applied to the administrative segregation of inmates until the respondents reinterpretation of §83-4,114 pursuant to the repeal of NDCS Rule 6(14) and enactment of NDCS Rule 6(16) in September 1985, or to Death Row inmates until the promulgation of the 26 November 1984 and 5 December 1984 Death Row schedules along with the subsequent repeal of NDCS Rule 6(14) and enactment of NDCS 6(16) in September 1985. Thus, NDCS Rule 6(14) close confinement provisions prevented the solitary confinement of inmates for purposes of institutional control.

Respondents' argument ignores the facts in this case. That Neb. Rev. Stat. §29-2204 (Reissue 1985) was the only statute to allow the imposition of solitary confinement upon the petitioner, on the date his criminal offenses were committed. It is obvious that the enactment of §83-4,114 on approximately 10 July 1976, the reinterpretation of §83-4,114 which resulted in the promulgation of the 26 November 1984 and 5 December 1984 Death Row schedules and the enactment of NDCS Rule 6(16) in September 1985 confers upon the

respondents a power that had been confided to the trial court pursuant to §29-2204, and is a departure from the law as it stood when petitioner's criminal offenses were committed. See In re Medley, 134 U.S. 160, 172 (1891).

A careful reading of the text of NDCS Rule 6(16) demonstrates that solitary confinement is a disciplinary or punitive measure when used for purposes of institutional control. The second sentence of NDCS Rule 6(16) mandates that no offender shall be placed in solitary confinement for disciplinary reasons. However, the third or final sentence of NDCS Rule 6(16) specifically mandates that this provision does not apply to segregation or isolation of persons for purposes of institutional control. Therefore, the final sentence of NDCS Rule 6(16) negates the provision of the second sentence that mandates that no offender shall be placed in solitary confinement for disciplinary reasons. Thus, the final sentence of NDCS Rule 6(16) specifically allows solitary confinement as a disciplinary or punitive measure instead of, as the respondents allege, being "reasonably related" to maintaining the safety and health of inmates and employees for purposes of institutional control.

Respondents state, in their Brief at 5, that, "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution." Thus, pursuant to NDCS Rule 6(16) the petitioner has been assigned to the additional disciplinary or punitive measure of solitary confinement based on petitioner's "status" of being convicted of a criminal offense that carried a sentence of death. Respondents cannot evade

the bar upon ex post facto laws by giving administrative form to the imposition of solitary confinement upon petitioner who is convicted of a criminal offense which resulted in the death penalty when the district court failed or refused to impose solitary confinement upon petitioner. See Cummings v Missouri, 71 U.S. (4 Wall.) 277, 325 (1867); see also Neb. Rev. Stat. §83-4,111(3) (Reissue 1987) which mandates that rules and regulations adopted pursuant to 83-4,109 to 83-4,123 shall in no manner deprive an inmate of any rights and privileges to which such person is entitled under other provisions of law or under policies adopted in a correctional institution

That imposition of solitary confinement pursuant to §29-2204 or §83-4,114 and NDCS Rule 6(16) constitutes an additional punishment when its imposition is based upon petitioner's status of being convicted of a criminal offense which resulted in the death penalty.

An analysis, under DeVeau v Braisted, 363 U.S. 144, 160 (1960) and Turner v Safely, ___ U.S. ___, 107 S.Ct. 2254, 2261-62 (1987), as to the reasonableness of petitioner's solitary confinement, will reveal an exaggerated response to the situation and an intent to punish without penological justification, which constitutes a violation of the Ex Post Facto Clause.

II

EIGHTH AMENDMENT

Petitioner alleged in his Complaint that he is confined in solitary confinement pursuant to §83-4,114 and NDCS Rule 6(16). The district court accepted petitioner's allegations as true at the pleading stage and apparently rejected the acting Director's

response in the prison grievance attached to petitioner's Complaint. See Cruz v Beto, 405 U.S. 319, 322 (1972). Furthermore, respondents admit, in their Ex Post Facto argument, that §83-4,114 and NDCS Rule 6(16) expressly authorizes the segregation or isolation of any inmate "for purposes of institutional control" and that "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution. Thus, the district court and Eighth Circuit correctly determined that the placement of petitioner in solitary confinement on death row . . .". Thus, respondents' intimation that petitioner is not confined in solitary confinement when they state "Although petitioner freely and mistakenly uses the term 'solitary confinement' to describe his confinement, . . ." or quote from the acting Director's response to a prison grievance attached to petitioner's complaint, is without merit.

As argued in this Reply Memorandum, at 3, a careful reading of the text of NDCS Rule 6(16) demonstrates that solitary confinement is a disciplinary or punitive measure when used for purposes of institutional control and as the respondents have admitted in their Ex post Facto argument "Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution" the placement of petitioner in solitary confinement based upon his status of having been convicted of a criminal offense which resulted in the imposition of the death penalty constitutes cruel and unusual punishment without penological justification. See Turner v Safely, 107 S.Ct. at 2261062; Robinson v California, 370 U.S. 660 (1962); Trop v Dulles, 356 U.S. 86, 99 (1958)

CONCLUSION

The Eighth Circuit Court of Appeals erred when it affirmed the district court's finding that the ex post facto clause was not implicated, whether the imposition of solitary confinement is totally without penological justification and involves unnecessary infliction of pain and is grossly disproportionate to the end to be achieved or the crime warranting imprisonment, and the failure to address whether some of meaningful periodic review of the conditions of death row confinement is required to insure that conditions do not violate the Constitution.

Respectfully submitted,

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Pro Se

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CERTIFICATE OF SERVICE

STATE OF NEBRASKA)
COUNTY OF LANCASTER) SS.

I, John E. Rust, being first duly sworn, depose and state that a copy of the foregoing Petitioner's Reply Memorandum to the Opposition Brief of Amicus Curiae on Behalf of Respondents was sent to the Respondents' attorney: William L. Howland, Nebraska Department of Justice, 2115 State Capitol, Lincoln, Nebraska 68509, by United States Mail, postage prepaid, this 5th day of March 1990.

John E. Rust
Affiant

SUBSCRIBED AND SWORN to before me on this 5 day of March, 1990.

JO GRAY
NOTARY PUBLIC

